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COURT OF APPEALS
STATE OF NEW YORK

STEVEN PLAVIN,

Appellant,

-against-

NO. 12

GROUP HEALTH INCORPORATED,

Respondent.

20 Eagle Street
Albany, New York
February 11, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

CAITLIN HALLIGAN, ESQ.
SELENDY & GAY PLLC
Attorney for Appellant
1290 Avenue of the Americas
New York, NY 10104

JOHN GLEESON, ESQ.
DEBEVOISE & PLIMPTON LLP
Attorney for Respondent
919 Third Avenue
New York, NY 10022

Penina Wolicki
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 12, Plavin v. Group
3 Health Insurance Incorporated.

4 MS. HALLIGAN: Thank you, Your Honor. May it
5 please the court, Caitlin Halligan for Mr. Plavin. I'd
6 like to reserve two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: Two minutes, Ms. Halligan?

8 MS. HALLIGAN: Yes, Your Honor.

9 CHIEF JUDGE DIFIORE: Two?

10 MS. HALLIGAN: Thank you.

11 CHIEF JUDGE DIFIORE: You may, of course.

12 MS. HALLIGAN: The answer to this certified
13 question is straightforward. GHI wrote and distributed
14 marketing materials, advertising its health-insurance plan
15 to Mr. Plavin plus more than 600,000 other New York City
16 public employees and retirees, in order to persuade them to
17 pick the GHI plan over other options.

18 In those materials, GHI described its coverage of
19 out-of-network services in terms that Mr. Plavin alleges
20 and the Third Circuit agreed were materially misleading,
21 because they created unrealistic expectations about how
22 much GHI would pay for out-of-network services - - -

23 JUDGE GARCIA: Counsel, in your - - - in your
24 case, you have these eleven, I think, different plans and
25 you have hundreds of thousands, I believe - - - or at least



1 more than 100,000 current/former employees.

2 MS. HALLIGAN: 600,000, yes, Your Honor.

3 JUDGE GARCIA: And so you can see this in an
4 analogy to a marketplace and a choice in a marketplace and
5 marketing.

6 MS. HALLIGAN: Yes.

7 JUDGE GARCIA: It seems your opponent's rule
8 would be fairly clear-cut. While the facts of your case
9 are compelling in that way, where would this court draw a
10 line or where could we create a rule based on this type of
11 scenario, where it really is somewhere, I guess, in between
12 NYU and Oswego, right?

13 MS. HALLIGAN: Right. Right. So - - - so Your
14 Honor, I think that - - - that Oswego and Gaidon together
15 really do answer this question, and that's why I say that
16 it's straightforward. So in Oswego, the court lays out the
17 test for when conduct is consumer-oriented. And it says
18 you have to look at whether or not it affects just the
19 plaintiff in front of you - - - which is obviously what
20 happened in NYU - - - or whether it potentially affects a
21 wider group of similarly situated - - -

22 JUDGE GARCIA: But let's say - - -

23 MS. HALLIGAN: - - - consumers.

24 JUDGE GARCIA: - - - it's ten employees, one
25 healthcare plan, but you have the option to get your own



1 outside of your employment?

2 MS. HALLIGAN: Right.

3 JUDGE GARCIA: How would that - - -

4 MS. HALLIGAN: Well - - -

5 JUDGE GARCIA: - - - fit into your test?

6 MS. HALLIGAN: - - - ten employees would perhaps
7 pose a different question. When we looked at the case law,
8 I think the smallest number of consumers we saw was 143.
9 So - - -

10 JUDGE GARCIA: Um-hum.

11 MS. HALLIGAN: - - - ten employees would pose a
12 different question there. Right?

13 But - - - but really what GHI is asking this
14 court to do, Your Honor, is to focus on the wrong party and
15 the wrong transaction. It's the only way they can claim
16 that NYU has any traction here.

17 JUDGE GARCIA: Well, and I understand. And I - -
18 - I - - - I follow that argument. And I particularly think
19 it's compelling in this case on these facts.

20 MS. HALLIGAN: Yes.

21 JUDGE GARCIA: But if we go in - - - into that
22 direction where we're applying it here - - -

23 MS. HALLIGAN: Um-hum.

24 JUDGE GARCIA: - - - you know, 173 - - - I think
25 it's - - - you know, that number seems so arbitrary. Where



1 - - - what kind of guidance would we have to give to in
2 some way place limitations between this case with 600,000 -
3 - -

4 MS. HALLIGAN: Right.

5 JUDGE GARCIA: - - - and eleven choices, to a
6 handful of employees with one choice or you go your own
7 way?

8 MS. HALLIGAN: Well, I think a handful of
9 employees, you know, we could set to the side and - - - and
10 would not in any way be touched by this case, because there
11 are 600,000 employees.

12 I think the question that Your Honor is - - - is
13 perhaps getting at is does it make a difference that the
14 access to the marketplace here is provided pursuant to some
15 arrangement with the City. And this - - - it doesn't, for
16 the following reason.

17 First of all, this is a case that is very much
18 like Gaidon itself, right? So in Gaidon, what the court
19 did is it said this is not a dispute about whether or not
20 there was a false guarantee made in the policy. It's not
21 about the terms of the policy, it's about whether or not
22 the extensiting (sic) - - - extensive marketing created
23 unreasonable expectations, unrealistic expectations about
24 coverage.

25 JUDGE GARCIA: But my concern really more is with



1 the marketplace.

2 MS. HALLIGAN: Yes.

3 JUDGE GARCIA: So in this case, you can say
4 600,00 people - - -

5 MS. HALLIGAN: Yes.

6 JUDGE GARCIA: - - - has the attributes of a
7 marketplace. But twenty people, does that have the
8 attributes of a marketplace? Same facts.

9 MS. HALLIGAN: Right.

10 JUDGE GARCIA: Or fewer choices. You can - - -
11 you can move the variables. But where do we draw the - - -
12 because this is aimed at something.

13 MS. HALLIGAN: Right.

14 JUDGE GARCIA: Right? And here, again, you have
15 600,000, but the next case we won't have 600,000.

16 MS. HALLIGAN: Right. And - - - and I think that
17 if the court is confronted with a case where there's fifty
18 consumers, for example, that one might be harder. The
19 Appellate Divisions have looked at this consistently over
20 the years, and they really have found that where there is
21 some material number - - - 143 - - - or for example, the
22 members of health - - - of an auto insurance policy where
23 they all go to the same auto repair shop. Right?

24 That - - - that can't be that many individuals
25 who all go to the same auto repair shop. So - - -



1 JUDGE STEIN: But does it matter whether the
2 choice is between one offered by the City and some others
3 maybe not offered by the City, as long as there is a
4 choice? So in other words - - -

5 MS. HALLIGAN: Your Honor, I actually - - -

6 JUDGE STEIN: - - - I - - -

7 MS. HALLIGAN: - - - don't think that the - - -
8 that the fact of the choice matters here, and th - - - and
9 this is why. The question of whatever GHI and the City
10 agreed to that allowed GHI to access this marketplace, is
11 completely irrelevant and not before the court. The
12 contract itself, whatever it might say, we don't have.
13 It's not in the record.

14 So whatever those terms are, they're not before
15 the court. And the - - - and I would urge the court to
16 look at the certification order from the Third Circuit,
17 where the court says very clearly, the only documents
18 alleged to be in the plaintiffs' hands - - - and this is
19 the constraint - - - maybe this goes in part to - - - to
20 your question, Judge Garcia, how do we cabin a ruling here
21 - - - what the Third Circuit says is he had two documents.
22 They're both marketing materials solely authored by GHI
23 that describe the plan.

24 So in that regard, it's no different than Gaidon.

25 JUDGE STEIN: But - - - but that's not the - - -



1 that's not the point of my - - - the point of my question
2 is, is that the consumer - - -

3 MS. HALLIGAN: Yes.

4 JUDGE STEIN: - - - has a choice whether or not
5 to select that - - -

6 MS. HALLIGAN: Yes.

7 JUDGE STEIN: - - - insurance policy. And the
8 conduct that's alleged here is that GHI was deceptive - - -

9 MS. HALLIGAN: Yes.

10 JUDGE STEIN: - - - in promoting its insurance
11 policy over whatever other choices there might be, whether
12 it's one or two or inside the city or outside the city
13 program, or whatever. The - - - the point is, is that
14 that's the deceptive conduct.

15 MS. HALLIGAN: Yes.

16 JUDGE STEIN: Choose our policy because it offers
17 you X, Y, and Z, where there's any choice at all.

18 MS. HALLIGAN: Yes, yes. And - - - and so that
19 is exactly part of the deception that we are addressing
20 here.

21 And - - - and the Attorney General's brief points
22 out an additional type of deception that would not be at
23 play even if there is no choice, and that type of deception
24 is the following.

25 If you, as a consumer, are trying to decide



1 whether or not to go in-network or to go out-of-network,
2 you will probably care - - - we all care what kind of
3 reimbursement you're going to get for those out-of-network
4 services.

5 So one question is exactly the one Your Honor
6 identified, Judge Stein, which is do I pick GHI, which is
7 billing itself as a PPO in a meaningful sense, because it's
8 telling me that the reimbursement rates are substantial for
9 out-of-network services? That turns out to be one
10 misrepresentation.

11 The second misrepresentation, and the Attorney
12 General's enforcement efforts have been robust in this
13 regard, and my adversary's reading would really curtail the
14 ability to police the marketplace in this way, is if the
15 package said - - - if the marketing materials say there is
16 substantial coverage of out of-network-services - - - if I
17 may just finish my answer - - - and you pick out-of-network
18 services and then you are stuck with a large out-of-pocket
19 bill, that is a separate kind of misrepresentation that the
20 Attorney General's Office has - - - has policed, using the
21 powers provided under 349, and very much like the kind of
22 misrepresentation at issue in Gaidon.

23 CHIEF JUDGE DIFIIORE: Thank you, Counsel.

24 Counsel?

25 MR. GLEESON: May it please the court, John



1 Gleeson for GHI.

2 I - - - I want to start, if I may, addressing
3 Judge Garcia's question. And it's kind of an interesting
4 situation we have. The Third Circuit said to us, would you
5 like us to certify questions? And we both said no. And
6 the - - - the Plavin folks - - -

7 JUDGE FAHEY: We didn't, though. We were stuck
8 with it, so - - -

9 MR. GLEESON: Yeah, you said - - - right. Don't
10 blame us.

11 The - - - we said to the Third Circuit, first
12 Plavin said no, this - - - a straightforward application of
13 Oswego Laborers' means we win. And we said no, don't
14 certify a question because the straightforward application
15 of Oswego Laborers' and NYU means we win.

16 Now, I'm going to suggest this case doesn't fall
17 in the middle, Judge Garcia, because there's a principle
18 that underlies those two cases, Oswego Laborers' on the one
19 hand, and NYU, ten months apart. And the principle is
20 this. It doesn't have to do with the size of the class; it
21 has to do with what the consumer protection law, what the
22 GBL 349 and 350 protects.

23 And it protects against the imbalance of
24 bargaining power that inheres when a consumer deals with a
25 large company. So I want - - -



1 JUDGE STEIN: So why is that not the case here?
2 Because it seems to me that - - - that the answer to that
3 depends on whether you focus on the insurance contract and
4 the negotiation of that contract between the unions and the
5 City and - - - and GHI, or whether you focus on the
6 communications between GHI and the employees. Don't you
7 get a different answer depending on what you - - - which of
8 those two things you focus on?

9 MR. GLEESON: Judge, a fundamental flaw in the
10 argument is that the premise that - - - on which the GBL
11 claims are supposed to be involved in this case, is that
12 there's this market - - - the premise is that there's
13 competition among the plans chosen by the City and the
14 Municipal Labor Committee. And in fact, there is none.
15 And in fact, in the - - - this has been - - - this is not a
16 stationary target, this argument.

17 In the district court, the argument against the
18 application of NYU was not that there's a secondary part of
19 this market where there's competition among the plans. In
20 the district court, the argument was no, NYU is a
21 university, and we're not; and we have 600,000 members.

22 This - - - this argument is - - - is of recent
23 vintage, and the argument is after the MLC, which
24 represents the City workers and retirees, and the City
25 arrive at an array of plans, then there's competition at



1 that point - - -

2 JUDGE FAHEY: But - - - but I - - - maybe I
3 misunder - - - maybe I misunderstood the arguments, but I
4 thought the argument against NYU applying here was that NY
5 - - - in the NYU case, the policy there was tailored for a
6 particular need for - - - and it was not a standard policy,
7 what - - - what's known as a bespoke policy. And I thought
8 that was the distinction that was drawn?

9 MR. GLEESON: Yes, that's our distinction.

10 JUDGE FAHEY: Um-hum.

11 MR. GLEESON: District court agreed with us. And
12 there - - - now, the - - - the reason Gaidon - - - the
13 reason the lessons of Gaidon and Oswego help us, is those
14 are cases - - - Oswego involved a plaintiff who was dealing
15 with the same off-the-rack signature card that - - - that
16 gave information about interest rates - - - kind of a cute
17 case, interest rates and savings accounts - - - but gave -
18 - - and it's the same card that was given to everyone who
19 walked into the bank.

20 The same thing with Gaidon. Those vanishing
21 premium - - - the information about vanishing premiums
22 which was deceptive, was information given to all of the
23 policyholders.

24 JUDGE STEIN: But I thought that they were
25 particularized - - - they gave particular projections, or



1 whatever, for each individual. Does - - - does that make
2 any difference?

3 MR. GLEESON: They did. But the - - - the
4 deceptive part about the - - - of the - - - the deceptive -
5 - - the allegedly deceptive nature of the communications
6 was the same with respect to everyone who dealt with the
7 insurance company. That's what made it consumer-oriented
8 conduct. Whereas in NYU, when there is a bespoke contract
9 negotiated - - - this is the key, this is what the NYU case
10 ten months after Oswego made clear - - - when there are
11 sophisticated negotiating parties on either side, there's
12 no - - - the whole point of the GBL is to protect folks - -
13 -

14 JUDGE STEIN: Yeah, but in - - -

15 MR. GLEESON: - - - who suffer from - - -

16 JUDGE FAHEY: But what about - - -

17 JUDGE STEIN: - - - in NYU, it was that
18 sophisticated party that negotiated the contract who was
19 then making the GBL claim.

20 MR. GLEESON: Yes. And here the - - - what makes
21 this case unique, I'll suggest respectfully to this court,
22 is there is an elaborate statutory scheme that's been going
23 on for fifty years, since the mid-60s. The - - - the first
24 backbone of it is an obligation on the part of the City to
25 pay one hundred percent of the premiums for City workers'



1 and retirees' health benefits.

2 At the same time, the MLC, which has a statutory,
3 state-law, local-law, federal-law duty to protect the
4 interests of those employees, was created for the express
5 purpose of negotiating, selecting, and administering the
6 healthcare plans.

7 The point I wanted to get to earlier is there's -
8 - -

9 JUDGE RIVERA: But - - -

10 MR. GLEESON: - - - there's - - -

11 JUDGE RIVERA: - - - but doesn't - - - doesn't
12 all that mean - - - and correct me if I'm misunderstanding
13 this - - - all that means is that there's a government
14 entity that's going to pay and that it has said we're going
15 to - - - we're going to limit the universe from which our
16 employees can choose? But choose they must.

17 So we're still back to whether or not 349, then,
18 protects the information that the chooser, the employee
19 has, in that choice process. Or have I misunderstood what
20 goes on in this process?

21 MR. GLEESON: Yes, you have.

22 JUDGE RIVERA: Okay.

23 MR. GLEESON: Respectfully.

24 JUDGE RIVERA: Okay.

25 MR. GLEESON: There - - - the choice that is



1 posited by my adversary doesn't exist. The MLC and the
2 City arrive at a bespoke selection of plans. They don't
3 compete with each other, Judge Rivera. This is the only -
4 - -

5 JUDGE RIVERA: You mean the employee can't say I
6 want this plan versus this plan?

7 MR. GLEESON: They - - - they can, but ninety-
8 five - - -

9 JUDGE RIVERA: Well, that's choice.

10 MR. GLEESON: - - - percent of them - - -

11 JUDGE RIVERA: Right.

12 MR. GLEESON: - - - end up in the only - - - this
13 is paragraph 20 of their complaint - - - this is the only
14 prever - - - preferred provider organization plan that's
15 no-premium that's offered. And this is the one that was
16 selected.

17 JUDGE RIVERA: It's the best deal, so we can see
18 why - - -

19 MR. GLEESON: And it's the best - - -

20 JUDGE RIVERA: - - - the choice works in that
21 dirtion.

22 MR. GLEESON: And it's the only - - -

23 JUDGE FAHEY: Isn't that the core of the - - -

24 MR. GLEESON: - - - deal of that type.

25 JUDGE FAHEY: Isn't that the core of the



1 argument, though, is that they end up there because the
2 argument is this is the best deal. But of course, the AG
3 argument is - - - the argument on the other side is, no,
4 it's not the best deal, it's only the best deal because
5 their allegation is, is that deceptive business practices
6 make it appear to be something that it isn't.

7 MR. GLEESON: Well, obviously we have answers to
8 these - - -

9 JUDGE FAHEY: Okay, so - - -

10 MR. GLEESON: - - - the deceptions.

11 JUDGE FAHEY: - - - that being the case, and it's
12 based on - - - it's based on a claim that if you're out-of-
13 network, you only get twenty - - - somewhere between nine
14 and twenty-three percent of your costs actually provided
15 for, unless you buy an optional plan that is claimed that
16 there was misleading advertising for.

17 So that's the way I understand their argument.

18 MR. GLEESON: Judge Fahey, a single - - - this is
19 - - - obviously this regime has been in existence for a
20 very long time. This is an outlier case. You are not
21 going to find a City worker - - -

22 JUDGE FAHEY: But am I wrong in those numbers?
23 Am I wrong in those allegations?

24 MR. GLEESON: I'm sorry, the - - -

25 JUDGE FAHEY: Are those allegations incorrect?



1 Are those numbers incorrect?

2 MR. GLEESON: The numbers - - - forgive me.

3 JUDGE FAHEY: The numbers of nine percent to
4 twenty-three percent in out-of-provider costs?

5 MR. GLEESON: Oh, in - - -

6 JUDGE FAHEY: Because the way I understand it is,
7 it's not simply the contract, it's also the website and the
8 summary program description that come into play here in
9 terms of the marketing practices, and hence the allegation
10 for deceptive business practices.

11 MR. GLEESON: The - - - it is true - - -

12 JUDGE FAHEY: Um-hum.

13 MR. GLEESON: - - - and it's explicit in the
14 program that the out-of-network benefits - - - this is a -
15 - - a City worker program - - -

16 JUDGE FAHEY: No, I know what it is.

17 MR. GLEESON: - - - a retiree - - -

18 JUDGE FAHEY: I know what it is. I got it.

19 MR. GLEESON: - - - moves to Middle Pennsylvania.

20 JUDGE FAHEY: Or he's a police officer. I got
21 it.

22 MR. GLEESON: And it - - - it's true that the
23 out-of-network benefits are pegged to a 1983 schedule. And
24 that's explicit. It's true that the example given in the
25 summary program description and in the - - -



1 JUDGE STEIN: Was that schedule provided to - - -
2 to the retiree?

3 MR. GLEESON: That schedule was available to - -
4 - there's a dispute about that. But the - - - the schedule
5 was available by - - - by calling up GHI folks. As you
6 know from the amicus brief, that schedule, that
7 information, is available at the local level, every step of
8 the way. The Local, which answers to the - - - to the - -
9 - the specific union - - -

10 JUDGE STEIN: Local GHI, you mean?

11 MR. GLEESON: No.

12 JUDGE STEIN: Oh.

13 MR. GLEESON: The Local of which the City worker
14 is a union member - - - 102 of them. Under the umbrella of
15 the MLC, they provide information. That information gets
16 funneled up to the MLC which - - -

17 JUDGE RIVERA: But - - -

18 MR. GLEESON: - - - negotiates with the City.

19 My point, Your Honor, is every step of the way
20 there is a - - - can I answer the question - - - can I
21 finish - - -

22 CHIEF JUDGE DIFIIORE: Please.

23 MR. GLEESON: - - - my answer Judge, DiFiore?

24 JUDGE FEINMAN: If I may also, I have a question.

25 CHIEF JUDGE DIFIIORE: Yes, of course.



1 MR. GLEESON: Every step of the way, there is a
2 sophisticated, created-by-statute - - - this is a unique
3 statutory scheme, the insertion into which of a - - - of a
4 GBL claim will cause great havoc - - - but every step of
5 the way, the kind of sophisticated bargaining assistance
6 this court premised the principle of the consumer-oriented
7 conduct on in NYU - - - every step of the way, an entity
8 like that is holding the hand of the union member, which is
9 why, Judge Fahey, you haven't seen these claims.

10 JUDGE FAHEY: Um-hum.

11 MR. GLEESON: It's - - - you're not going to see
12 a claim like this. You can search the case law for it.
13 And if it exists, it's a claim that exists not only against
14 the insurer, it exists against the union, it exists against
15 the City.

16 JUDGE FEINMAN: Mr. Gleeson - - -

17 MR. GLEESON: Yes.

18 JUDGE FEINMAN: - - - I want to come back to
19 something that you alluded to at the beginning of your
20 argument. I don't know that you fully fleshed it out. And
21 that is, how is it that your position actually squares with
22 the legislative history and purpose of the GBL, which seems
23 to cover a broad array of deceptive conduct?

24 And you st - - - started there, but then I think
25 you got asked a question and - - -



1 MR. GLEESON: So it - - -

2 JUDGE FEINMAN: - - - so I'm just curious if you
3 can give me that in a nutshell?

4 MR. GLEESON: Yes. The - - - the legislative
5 history and the purpose of the GBL, as made clear by this
6 court, in among other cases, NYU - - - the legislative
7 history is to protect the consumer - - - it's a consumer-
8 protection statute - - - from circumstances in which the
9 consumer suffers from a disparate bargaining-power
10 situation.

11 That's the critical purpose of the GBL. And
12 that's why it's such a generous cause of action. It
13 doesn't require a fraudulent statement. It doesn't require
14 a statement on which the consumer relies. It's a very
15 generous cause of action designed to compensate for that
16 imbalance in bargaining power.

17 Once you have a situation like this one where - -
18 -

19 JUDGE STEIN: Well, how was that true in Oswego?
20 Those are some pretty substantial organizations, right, and
21 funds?

22 MR. GLEESON: It was - - - communications there
23 were by a bank. Everybody who walked into that bank was
24 given a signature card that gave misleading information
25 about the interest that would accrue - - -



1 JUDGE STEIN: But what I'm saying is between the
2 plaintiff in Oswego and - - - or the - - - the funds,
3 right, and the bank, we're - - - you're not talking about a
4 small consumer off the street there, like you seem to be
5 espousing as the standard?

6 MR. GLEESON: Well, we don't - - - Judge, we
7 don't have before us the - - - the - - - for one thing it's
8 a not - - - it's not a bespoke arrangement, so it's not
9 being negotiated. And we also - - -

10 JUDGE STEIN: So - - - so it's not just about the
11 - - - the bargaining power, so - - -

12 MR. GLEESON: Well - - -

13 JUDGE STEIN: - - - that takes us out of that.

14 MR. GLEESON: - - - and I'm - - - I'm basing my
15 argument on a growth in the case law that came ten months
16 later with NYU. NYU made clear that it's the consumer-
17 oriented communications are ones that are addressed to
18 everybody - - - that's Oswego - - - but when the
19 communications are made in a context where there's a
20 sophisticated bargainer who's there to compensate for the
21 imbalance in bargaining power, that is not - - -

22 JUDGE RIVERA: Just to clarify, are you saying
23 Oswego stands for the proposition that it only falls under
24 349 if it's truly - - - truly something that's for every
25 member of the public?



1 MR. GLEESON: Well, not - - - it not only does,
2 but it certainly does. If it's communic - - - if it's
3 outward-facing communication that every customer who walks
4 into that bank faces, and it's allegedly deceptive, yes.

5 JUDGE RIVERA: Counsel, it's still a subgroup.
6 It's a group that's interested in that bank. So they've
7 made a choice already, to at least walk into the bank. How
8 is that not like making this choice here about what plan I
9 want?

10 MR. GLEESON: Because there are other banks on
11 that street into which that person could have walked.

12 JUDGE RIVERA: There are other plans - - -

13 MR. GLEESON: Here there's on - - -

14 JUDGE RIVERA: - - - here. I understand your
15 point that this is the better deal, but nevertheless.

16 MR. GLEESON: Well, I'm going to rely on
17 plaintiff's own allegation - - - I'm s - - - can I finish,
18 Judge - - -

19 CHIEF JUDGE DIFIIORE: Please.

20 MR. GLEESON: - - - thank you for giving me more
21 time than I deserve.

22 There - - - there are other banks on that street.
23 There is no other plan. The whole point of this apparatus,
24 a highly structured statutory matrix, is to deliver this
25 no-premium PPO organization plan to City workers. And



1 there's only one of them. There's no competition - - -

2 JUDGE RIVERA: Isn't the logical - - -

3 MR. GLEESON: - - - among them.

4 JUDGE RIVERA: - - - extension of this argument
5 that unless everybody was going to use a bank and make a
6 choice, then it's not consumer-oriented? You still have
7 only a subgroup of people who want to use a bank?

8 MR. GLEESON: I - - - yes. Some - - - only some
9 people will want to use the bank. And it's only that
10 category of folks who are putative GBL plaintiffs.

11 CHIEF JUDGE DIFIORE: Thank you, Counsel.

12 JUDGE GARCIA: Can I just - - -

13 CHIEF JUDGE DIFIORE: Go ahead, Judge Garcia.

14 JUDGE GARCIA: Just to go back to something Judge
15 Rivera was asking you earlier on the - - - on the facts or
16 how this works. And I may also misunderstand it. But I
17 thought these contracts were negotiated, and then there are
18 these - - - this pool of folks, current, former, they then
19 make a choice.

20 Is the revenue that your company or other
21 companies make ultimately dependent on how many people
22 choose to go with your company? Or - - - because otherwise
23 I'm not really understanding what's the point of the
24 choice.

25 MR. GLEESON: The - - - the second part, Judge



1 Garcia, is right. But the first part is there's no choice.
2 Ninety-five percent, because it's the only PPO plan with no
3 - - -

4 JUDGE GARCIA: But I think that gets to Judge
5 Fahey's point, which is that may be true in terms of the
6 numbers, but that may be giving them, you know - - -
7 assuming their allegations are true - - - some part of that
8 number may be because people are under a false impression,
9 a misleading statement was made about why they should go
10 with that plan.

11 So ultimately, I think, the numbers aren't as
12 important as what's the effect of the choice? I mean, is
13 the effect of the choice that your company gets revenue
14 from the folks that agree to sign up with your coverage?
15 Because that to me, is a consumer choice, right, where do I
16 spend - - - essentially spend dollars?

17 MR. GLEESON: There - - - the - - - the choice
18 here is made in advance of the City worker selecting a
19 plan. There's a choice of a no-premium PPO provider that's
20 made by the City workers' and retirees' representative, the
21 MLC, the umbrella organization. They make that choice with
22 the City, in an elaborate process.

23 I'll finish, unless there's another question, by
24 saying this. It's instructive - - - I'm glad the amicus
25 brief from the MLC cited the decision of MLC v. City of New



1 York, which - - - and I commend that - - - that decision
2 which is cited in that brief, to this court, because it
3 shows how highly structured and how under-the-control of
4 the City workers' and retirees' representative - - - the
5 MLC - - - the whole process is.

6 The City decided several years ago - - - this is
7 a 2013 case - - - maybe we shouldn't use GHI to deliver the
8 - - - this one PPO plan that has no premium, and began to
9 engage in that process without including the MLC. MLC got
10 them enjoined, because that statutory matrix and that 1992
11 agreement mentioned in that amicus brief, put in control of
12 the selection of the plans which are then delivered to the
13 retirees - - - puts that control in the hands of their
14 representative.

15 JUDGE GARCIA: But is your point that you have
16 only one choice on a PPO, but you can choose between a PPO
17 and a non-PPO, and most people choose the PPO? Is that
18 what you're saying?

19 MR. GLEESON: As - - - it's evidenced better in
20 the amicus brief than it is in ours, I'm sorry to report.
21 But no, those other - - - those other non-PPO, no-premium,
22 are kind of specialty. People - - - as described in the
23 amicus brief - - - if you've got a special physician need
24 or a special pharmacological need, the - - - or you're a
25 member of the Health and Hospital - - - an employee of



1 Health and Hospitals Corporation. They have a special
2 little program.

3 All of those combined comprise only five percent
4 of the City workers and retirees. The rest enter into the
5 program selected, negotiated, and administered for them by
6 their - - - their - - - the representative as to which - -
7 - as to which they're owed a statutory duty of good care -
8 - - a fiduciary duty of good care.

9 CHIEF JUDGE DIFIORE: Thank you, Counsel.

10 MR. GLEESON: Thank you.

11 THE COURT: Counsel?

12 MS. HALLIGAN: Thank you, Your Honor.

13 JUDGE RIVERA: Counsel, can you address this
14 argument, which I take essentially to be choice is
15 illusory; the real choice has already happened through that
16 negotiation process with the City and - - -

17 MS. HALLIGAN: Absolutely, Your Honor.

18 JUDGE RIVERA: - - - and the - - -

19 MS. HALLIGAN: A few responses, if I can.

20 JUDGE RIVERA: Yeah.

21 MS. HALLIGAN: First of all, I think Judge Fahey
22 has it exactly right. The point here is not with respect
23 to whatever a contract - - - not in the record, not before
24 the court, not before the Third Circuit - - - might say. I
25 don't know what it says.



1 The point that - - - that these claims are based
 2 on is, just like in Gaidon, the marketing materials that
 3 were extensive and were standardized and were sent out to
 4 600,000 employees, without any oversight by the City, were
 5 misleading. And the reason they were misleading is that
 6 they made the plan look more attractive than it was, and it
 7 made it look like a better deal, because it suggested that
 8 the key factor that would make you pick a PPO, if you could
 9 afford it - - - which is how much were you going to pay for
 10 out-of-network services - - - that that coverage was better
 11 than it really is.

12 That is the nub of the claim here. And so - - -

13 JUDGE GARCIA: But what is the choice? I am - -
 14 - I am a little confused, now, because I thought it was a
 15 choice, originally, between this plan and ten others.

16 MS. HALLIGAN: It is, Your Honor.

17 JUDGE GARCIA: Then I thought it was this plan
 18 and non-PPO plans. But it seems, at least according to
 19 your adversary here - - -

20 MS. HALLIGAN: Yes.

21 JUDGE GARCIA: - - - that it really isn't. That
 22 this is the plan, and these are other specialty plans that
 23 - - -

24 MS. HALLIGAN: Your Honor, first of all, I - - -
 25 I would say with respect to - - - to my friend, Mr.



1 Gleeson, I don't think there's anything in the complaint or
2 the record that supports this. And this case comes before
3 this court on a motion to dismiss. So the only thing
4 that's before you are the allegations in the complaint.

5 There are descriptions that - - - the marketing
6 materials that were sent out both through the summary plan
7 descriptions and the website are appended. And that's all
8 that's relevant. The only question is whether or not those
9 were consumer-oriented.

10 JUDGE GARCIA: Let me -- let me re - - -

11 JUDGE STEIN: What other factual - - -

12 JUDGE GARCIA: I'm sorry.

13 JUDGE STEIN: - - - just a clarification.

14 MS. HALLIGAN: Yeah.

15 JUDGE STEIN: I thought that there were two PPO
16 plans. Is that - - -

17 MS. HALLIGAN: I believe - - -

18 JUDGE STEIN: - - - is that wrong?

19 MS. HALLIGAN: - - - that there were, Your Honor.

20 And I don't think that there's any basis in the complaint
21 or the record to describe any other plans as specialty or
22 otherwise. I - - -

23 JUDGE GARCIA: Just - - -

24 MS. HALLIGAN: - - - I don't see any basis. But
25 - - - but in any event, one other point if - - - I see my



1 time is up, if I may just respond to two other points
2 briefly?

3 Judge Stein, you asked about the schedule. The
4 schedule was not available according to the complaint.
5 Again, you're bound by the allegations in the complaint.
6 And the Attorney General's assurance of discontinuance
7 makes clear that it was indecipherable in any event. So -
8 - - so that is, I think, not a - - - a defense.

9 And in any event, that question goes to something
10 the Third Circuit has resolved, which is whether or not the
11 misrepresentations are misleading. The Third Circuit found
12 that they are. The only question the Third Circuit thought
13 was open is whether they were communications to consumers.

14 One last point, if I can, and that's with regard
15 to the implications of this decision. My adversary says
16 that this is a one-off case, not just with regard to
17 somehow all of the City's public employees being like a
18 billion-dollar university with a bespoke contract for
19 shoplifting. Obviously, that comparison, I think, falls
20 flat - - - but suggests that - - - that this is a sport and
21 this court can decide it and - - - and it won't make much
22 difference.

23 That is absolutely wrong. The Attorney General's
24 Office explains why it is that this is a critical
25 enforcement question. There's no reason to think there's



1 concern with regard to anything that the City or the unions
2 would do. The City's a frequent litigant in your court. I
3 am sure that if it had those concerns, it would have made
4 an appearance and it would have said so.

5 And I would close by saying that at the end of
6 GHI's brief, it says well, if you disagree with our reading
7 of 349, we won't cooperate with the AG's enforcement
8 efforts when they look at whether we are making
9 misrepresentations to consumers.

10 I would say that that underscores that Mr. Plavin
11 and the other City employees are exactly the kinds of
12 consumers that are in need of the General Business Law's
13 protections for all the reasons in the legislative history
14 that Your Honor set forth, Judge Feinman. Thank you.

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Steven Plavin v. Group Health Incorporated, No. 12 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: February 14, 2020

